29, 1971

IN THE PRIVY COUNCIL **44 OF 1970**

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA HOLDEN AT PENANG

B E T W E E N :

THE GOVERNMENT OF THE STATE OF PENANG and

THE CENTRAL ELECTRICITY BOARD OF THE FEDERATION OF MALAYA — Appellants

AND

BENG HONG OON alias LIM BENG HONG (Married Woman)
OON GUAY YONG
OON PEH TCHIN and
OON PEH SENG — Respondents

(In the matter of Civil Suit No. 118 of 1962 in the High Court in Malaya at Penang)

CASE FOR THE APPELLANTS

RECORD

1. This is an Appeal by the Appellants the Government of the State of Penang and The Central Electricity Board of the Federation of Malaysia against an Order of the Federal Court of Malaysia (Azmi, Lord President, Suffian F.J. and Ali, F.J.) given upon the 9th February 1970 allowing an Appeal by the Respondents against an Order by Gill J. entered on the 19th February 1969 dismissing a claim by the Respondents for declarations affecting ownership of that part of Lot 808, Mukim 14 in the northern district of Province Wellesley in the State of Penang which lies along the westerly boundaries of Lots 275 (1) and 275 (3) and for an Order for the removal of all buildings or erections on the

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said part of Lot 808 and for certain further consequential Orders. This Appeal is brought by final leave of the Federal Court of Malaysia to appeal to His Majesty the Yang di-Pertuan Agong
p.138 given upon the 17th August 1970.

2. The Respondents are the owners in equal undivided shares of the fee simple absolute in possession of Lot 275 (1). The First Respondent is the registered owner of the fee simple absolute in possession of Lot 275 (3). In each case, title to the said land is derived from a grant contained in an Indenture of the 10th
p.152 November 1852 whereby the East India Company on behalf of Her Majesty Queen Victoria granted land including the said Lots to the Respondents' first predecessor in title. The Indenture of 1852 stated that this land was bounded on the west by the "sea beach". It contained measurements of the land and a plan which was held by Gill J. upon the evidence to contain a right line (i.e. fixed) boundary on the West

3. Lot 808 lies in part along the westerly boundaries of Lots 275 (1) and 275 (3). It has been formed of Alluvion since 1852. The First Appellants as successors in title to the Crown demised this Lot to the Second Appellants for a term of 33 years on the 12th August 1959. The Second Appellants have taken possession of the said land and erected a building thereon.

p.1. 4. The Respondents commenced proceedings in 1962 claiming in effect declarations that the line of the medium high tide of the sea between ordinary spring and neap tides from time to time constitutes the westerly boundaries of the said Lots 275 (1) and 275 (3); that the Respondents are entitled to that part of Lot 808 which lies along the westerly extremities of their respective Lots 275 (1) and 275 (3); alternatively, that the Respondents are entitled to free and uninterrupted access to the sea over Lot 808 on the westerly boundaries of their respective Lots. The Respondents further claimed an injunction requiring the removal of the building and fence erected on Lot 808 and an Order for vacant possession of Lot 808 and mesne profits in respect of the

occupation thereof by the Second Appellants. They alleged

(a) That the westerly boundary of the said Lots was the line of the said medium high tide of the sea between ordinary spring and neap tides;

(b) That the land comprised in Lot 808 which lies along the westerly extremities of their respective Lots had been created by a gradual, slow, imperceptible and natural increase of Alluvion;

(c) That they or their predecessors had been in possession of the said land for upwards of 60 years, and had planted and cultivated coconut trees thereon; and

(d) that the grant of the Lease by the First Appellants to the Second Appellants of said land and the erection of a building thereon by the Second Appellants was in the premises wrongful

The defences raised were :-

(i) A denial that the Alluvion was created or increased gradually and imperceptibly; p.11

(ii) That the original grant was for a specific area with a fixed western boundary; and

(iii) That the Respondents were estopped from disputing the title of the First Appellants to the land because they obtained Temporary Occupation Licences in respect thereof between 1949 and 1955.

The First Appellants also counterclaimed for the removal of a fence erected by the First Respondent, but this counterclaim was not pursued at trial and is immaterial hereto. By their Reply, the Respondents alleged that the Temporary Occupation Licences were obtained under a misapprehension by the Respondents of their rights in the light of a representation made to the First Respondent by a clerk in the Land Office who was a servant or agent of the p.19

First Appellants.

5. Both Appellants and Respondents accepted throughout that an owner of land bounded by the "sea" or seashore is entitled to land created by a natural, gradual and imperceptible accretion of Alluvion, but that land created by a sudden or perceptible accretion becomes the property of the owner of the foreshore. The first issue which arises is whether the burden of proof that an accretion was gradual and imperceptible rested on the Respondents, and, if so, whether upon the evidence they had discharged such burden. Mr. Justice Gill held that the burden of proof lay upon the Respondents and that they had failed to discharge it. Upon appeal, Azmi, Lord President, agreed that the burden of proof was on the Respondents but held that they had discharged it. Ali, F.J. held that the burden of proof was not upon the Respondents but that, if it was, they had succeeded in discharging it. Suffian F.J. concurred with all the conclusions and reasoning of Azmi, Lord President.

6. In the submission of the Appellants, Gill J. and Azmi, Lord President, were right in holding that the burden of proof lay on the Respondents. Ali, F.J. bases his conclusion to the contrary on the "intolerable burden" which would be imposed on the Respondents if they had to establish a gradual and imperceptible accretion. Ali, F.J. nevertheless held on the evidence that the Respondents had established such an accretion, and this suggests that in the last analysis he could not have regarded the burden of proof as intolerable. The Appellants submit that it was essential to the Respondents' case to prove the nature of the accretion. Attorney-General v. Chambers 4 De G. & J. 55 is not authority to the contrary since, as Gill J. rightly stated, the Crown there undertook the burden of establishing a perceptible accretion. In the instant case, paragraph 10 of the Further Amended Statement of Claim alleged :-

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> "The Alluvion has increased gradually, slowly, imperceptibly and naturally through the years and is still increasing in like manner."

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The Respondents thereby correctly accepted that it was necessary for them to aver and prove a gradual and imperceptible accretion.

7. The Appellants further submit that the Federal Court of Malaysia was wrong to reverse the finding of Mr. Justice Gill that the Appellants had not discharged the burden of proof. The learned Judge found as fact that the First Respondent went to live in her present house on Lot 271 (1), which is near the Lots the subject of the claim, in 1938. The only evidence as to the formation of Alluvion between 1852 and 1938 was that no Alluvion was shown by a survey in 1895 but Alluvion was shown by a survey in 1924. The First Respondent was away from her house between 1940 and November 1945. By the time she came back Alluvion had increased. The Alluvion adjacent to Lot 271 (1) increased in all between 1939 and 1962 by at least 50 feet. There was in relation to Lot 271 (1) land corresponding to the Alluvion of Lots 275 (1) and 275 (3). Mr. Justice Gill therefore held that the Respondents had not established that the original accretion was gradual and imperceptible. Azmi, Lord, President, held, however, that as the Alluvion had increased gradually and imperceptibly since 1938 it was a fair inference of fact that it had probably previously been formed in the same way. He also held that it was a fair inference that, if it had been caused by some violent act of nature or man, the First Appellant (being the Government of the State) would have known and suggested so. Ali, F.J. held that Alluvion had been gradual and imperceptible since 1924 (i.e. the date when Alluvion was first shown by survey) but made no finding as to the initial accretion. The Appellants submit that on the basis of his findings of fact Mr. Justice Gill was right to draw the inference that the original accretion had not been shown to be gradual and imperceptible. The initial accretion could have occurred in a sudden manner and thereafter have been the subject of a gradual increase, and consequently the inference drawn by the Federal Court cannot be derived from the manner of the increase after 1924 or 1938.

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8. The second issue which arises, if the Respondents establish a gradual and imperceptible creation of Alluvion, is the position of the western boundary of their land. The Respondents
p.152 claim that the Indenture of 1852 established this boundary as at the seashore. As has been indicated, Mr. Justice Gill held that the boundary shown on the plan was a right line boundary. He further held, relying on Musselburgh Magistrates v. Musselburgh Real Estate Company (1904) Sc.L.R. 247, that the use of the word "seabeach" was not synomynous with
p.77 "Seashore". He found that the effect of the grant was to create a right line boundary which did not extend right up to the sea or the seashore. He further held that the general principle of accretion only applied to land which was bounded by the seashore. Upon appeal Azmi, Lord President, did not deal at all with this aspect of the case. Ali, F.J. held that it was irrelevant whether the initial boundary was a right line boundary and further irrelevant
p.132 whether or not the western boundary was originally at the sea. He relied upon Gifford v. Lord Yarborough (1828) 5 Bing. 163; Brighton & Hove General Gas Co. Ltd. v. Hove Bungalows (1924) 1 Ch. 372; and Secretary of State for India in Council v. Foucar & Co. Ltd. (1933) 50 T.L.R. 241; the Respondents also refer to Attorney-General of Southern Nigeria v. John Holt & Company (Liverpool) Ltd. (1915) A.C.599. The Appellants accept that these cases show that the general principle as to ownership of Alluvion can apply even although the location of the boundary was or could have been ascertained at the time of, or sometime following, the grant. The Appellants submit, however, that these cases all related to grants which had the effect of conveying land with a fluctuating boundary to the seashore. The Appellants suggest that the position is different if upon its proper construction the original grant did not convey land with such a fluctuating boundary. They further submit that Mr. Justice Gill was right in finding that the use of the expression "sea beach" together with a right line boundary indicate that the land granted did not go down to the seashore. The Appellants alternatively submit that the conveyance did not show an

intention that the land granted should have a fluctuating boundary. It must always be open to the parties to a grant of land abutting the seashore to agree that the boundaries of the land granted shall remain constant notwithstanding an alteration in the line of the seashore by reason of Alluvion. The Respondents submit that the grant in the instant case evidences such agreement.

9. The Respondents further allege that they and their predecessors in title had been in possession of the Alluvion for upwards of 60 years and were in consequence entitled thereto. Mr. Justice Gill held that the evidence did not establish a possessory title. Azmi, Lord President, did not consider this point in his judgment, but Ali, F.J. also rejected the claim to a possessory title. Without deciding as to the validity of the finding of Mr. Justice Gill on the evidence, he held that (assuming the accretion to vest in the Crown) the Respondents' possession of such Crown land was unlawful and that consequently they could not acquire possessory title thereto. The Appellants submit that Mr. Justice Gill was right to draw the conclusion on the facts found by him that the Respondents had not established the adverse possession for which they contended. He was entitled to hold that there was no evidence of any adverse possession by their predecessors in title. Thus adverse possession could not commence prior to acquisition of the land by the Respondents, namely in 1944 in the case of Lot 275 (1) and in 1947 in the case of Lot 275 (3). Thereafter the Respondents obtained Temporary Occupation Licences to the land from the First Appellants and their possession was attributable to such Licences. They were deprived of possession as from not later than 1959. Thus there was no adequate continuous period of adverse possession.

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10. The final substantive issue is whether the Respondents are estopped from claiming title to the disputed land as against the Appellants. The First Respondent had lived (with the exception of her absence from 1940 - 1945) adjacent to the disputed land since 1938. In 1949 she applied for Temporary Occupation

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Licences in relation to both Lots of the disputed land. Such Licences were granted by the Collector of Land Revenue, Butterworth, on behalf of the First Appellants. The First Appellant subsequently leased the land to the Second Appellants who erected a building thereon. Mr.
p.82 Justice Gill upheld the contention of the Appellants that by obtaining a Temporary Occupation Licence the Respondents were estopped from denying the title of the First Appellants to the Alluvion by reason of Section 116 of the Evidence Ordinance 1950. Section 116 provides as follows :-

> "No tenant of immovable property, or person claiming through such tenant, shall during the continuance of the tenancy be permitted to deny that the landlord of such tenant had at the beginning of the tenancy a title to such immovable property; and no person who came upon any immovable property by the licence of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such licence was given."

Mr. Justice Gill held that this section deprived
p.82 the Respondents of the right to challenge the Appellants' title despite the fact that at no time during the currency of proceedings had the relationship of licensor and licensee subsisted. The learned Judge relied upon Dukhimoni Dasi v. Tulso Charan (1912) Indian Cases 513, where a similar conclusion was reached upon the identical provision of the Indian Evidence Act. Azmi, Lord, President, relying upon Terrunnanse v. Terrunnanse (1968) 2 W.L.R. 1125, held that section 116 of the Evidence Ordinance must be construed in the light of English case law. He considered that the High Court of India had interpreted section 116 too narrowly in Dukhimoni Dasi v. Tulso Charan (supra). Ali, F.J. also held that a licensee could deny title after he had given up possession, and further held that
p.133 the Respondents, by making a positive claim, were not disputing the title of the Appellants. The Appellants concede that if English case law is applicable in the instant case the Respondents would not be estopped as they had ceased to be in possession of the land. The Respondents submit,

however, that the principle of Terrunnanse v. Terrunnanse (supra) would not apply in so far as the wording of section 116 itself expressly required a conclusion differing from English case law. The Respondents submit that there is a clear distinction between the first limb of section 116 preventing a tenant from denying title during the continuance of his tenancy and the second limb of section 116 which is not subject to any such limitation in time. They submit that this distinction indicates the intention of the legislature that the estoppel shall continue notwithstanding that the licence has been determined, and that Dukhimoni Dasi v. Tulsi Charan (supra) was rightly decided.

11. A subsidiary point arose with regard to the estoppel. The Respondents submitted that the circumstances in which they applied for the Temporary Occupation Licence were such as to prevent the Appellant contending that it established an estoppel. Mr. Justice Gill p.81 rejected the evidence of the First Respondent as to the reasons why she applied for the Temporary Occupation Licences, but held that in any event she did so of her own volition and accordingly could not thereby prevent the operation of the estoppel. Neither Azmi, Lord President, nor Ali, F.J. expressly dealt with this point.

12. The Appellants therefore submit that the Appeal should be allowed for the following among other

R E A S O N S

(1) BECAUSE the burden of proof lay upon the Respondents to establish that there had been a gradual and imperceptible accretion of Alluvion, and that the learned Judge rightly held that they had not discharged that burden

(2) BECAUSE the learned Judge was right in holding that the boundaries of Lots 275 (1) and 275 (3) did not extend right up to the seashore.

(3) BECAUSE the boundaries of Lots 275 (1) and 275 (3) were right line boundaries which did not fluctuate with the seashore and, accordingly, the general principle as to ownership of Alluvion did not apply.

(4) BECAUSE the learned Judge was right in holding that the Respondents had not established a possessory title to the said land

(5) BECAUSE the learned Judge was right in holding that the Respondents were estopped from denying the title of the First Appellants to Lot 808.

(6) BECAUSE the decision of the Federal Court was wrong and the decision of Mr. Justice Gill was right and ought to be restored.

ROBERT ALEXANDER.

44 OF 1970

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CASE FOR THE APPELLANTS

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